No. 393.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY AGNES RYAN and CHARLES RYAN, JR., a Minor, and MARY RYAN, a Minor, by their Guardian *ad litem* MARY AGNES RYAN,

Plaintiffs in Error,

vs.

C. J. SMITH, as Receiver, etc., of the Oregon Improvement Company, a Corporation,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

SIDNEY V. SMITH,

Attorney for Defendant in Error.

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The first eleven specifications of error relate to rulings of the trial court upon the admissibility of evidence. As nothing is said about these rulings in the argument for plaintiffs in error, it is to be presumed that the objections to them are now waived.

The case stands, then, on the criticisms of the counsel for the plaintiffs upon portions of the charge to the jury appearing on pages 43, 45, 48 and 52 of the

Record. These criticisms are put by counsel under three heads, but upon analysis seem really to be presentable under only two, namely that the court erred in instructing, substantially, that the accident to Ryan was caused either by his own negligence, or by that of his fellow servants.

Strictly speaking, the court made no such absolute instruction, but, with ample explanation, left it to the jury to decide whether, under all the circumstances, and considering the nature and course of the business and work in which Ryan was engaged, the duty of keeping the tails in order did not belong to either Ryan or his fellow servants, and whether, in the light of the law laid down by the court in that respect, the accident was not the result of negligence in the performance of that duty, either on the part of Ryan himself or of his co-workers. All through the instructions appeared the opinion of the court that, under some circumstances, it is legally possible for an employer to devolve upon his workmen the duty of keeping their apparatus in repair, and that when, in a particular case, he has done this, neglect as to that duty is not attributable to the master, but to those persons upon whom the duty has been devolved. The argument for the plaintiff in error is an attempt to show that the master can in no case delegate to his workmen his duty of keeping apparatus in repair, so as to escape his own responsibility, and this, I apprehend, upon the ultimate analysis, is the only question before the court on this appeal, as, if it be determined that the master could under the circumstances of this

case cast upon his servants the duty of keeping the tails in repair, it can make no difference whether the neglect to perform this duty was that of Ryan or the other workmen. In either case the fault was not that of the defendant.

The proposition for which the defendant in this case contends is that, while, as a general rule of law, it is the master's duty to keep apparatus in repair, the nature of the business or work may be such as to throw the duty of repair upon the servant himself, as a part and in the course of his employment, and that to such a case the general rule does not apply.

With the general rule, as stated by the plaintiffs, or with the authorities cited by their counsel in its support, we have no quarrel, but we insist that, like all other principles of law, it has its qualifications and modifications, growing out of the varying circumstances of different cases, and necessary to fit it to the results of "reason and experience."

An examination of the authorities cited by plaintiffs' counsel will disclose that they are applications of the familiar rule, that if an employer delegate to another the performance of his duty of keeping apparatus in repair, that other stands in the place of and represents his principal, his negligence is the negligence of the principal, and, as to the duty of repair, he is not ordinarily the fellow servant of other employees who may be injured by his neglect. These decisions were all given in cases where the injured employee, though engaged in the use of, was not charged with the

duty of repairing, the apparatus, and where the person to whom the master had delegated that duty was held for that reason not to be, as to that duty, the fellow servant of the injured employee. The brakeman, for intance who is injured by reason of the defective condition of a car, is not charged with the duty of repairing the car; and the car-builder, or master mechanic,or car, inspector is charged with that duty by and in the place of the railroad company, and is not, as to this duty, the brakeman's fellow servant. But how, if the injured employee has himself been charged by the master or by the custom or nature of the business, with the care and repair of the apparatus? Or how, if the injured employee is one of several others to whom the duty of repairing has been delegated by the master or the custom or nature of the business, and his injury has been caused by the neglect of some of his co-employees in that duty? To these questions the cases cited give no answer.

That the rule as to the impossibility of the master's delegating his duty of repair must be qualified and relaxed when that duty concerns defects in the apparatus which may be easily remedied by the workman himself, and that, as to such repairs, the workmen are fellow servants, is abundantly sustained by authority.

Cregan *vs.* Marston, 126 N. Y., 568.
Harley *vs.* B. C. M. Co., 142 N. Y. 31.
McCampbell *vs.* C. S. Co., 144 N. Y., 552.
Kimmer *vs.* Weber, 151 N. Y., 417.
Burns *vs.* Sennett, 99 Cal., 368.

R. R. Co. *vs.* Sewell, 46 Illinois, 100.
Noyes *vs.* Wood, 102 Cal., 392.
Stroble *vs.* R. R. Co., 70 Iowa, 558.
Bailey on Master's Liability, pp. 33, 169.
McKinney on Fellow Servants, § 36.

We shall not trouble the court with citations from these authorities but content ourselves with assuring the court that a perusal of them, and especially a reading of Cregan *vs.* Marston, will demonstrate that the rule relied on by the plaintiffs in error has no application to such repairs as can and ought to be made by the workman himself. There are some defects in apparatus, which, if the workmen notice them, he should at once report to his employer, so that they may be repaired by the proper persons. There are other defects, so simple, so easily remedied, so peculiarly within the observation and control of the workman himself, that he should himself immediately rectify them, and cannot shield himself from his own negligence in failing to do so by invoking the duty of the master to keep his apparatus in repair. The brakeman must see that his brake is constantly in order, the stevedore must look to his planks and ropes and pulleys, the painter must erect his own staging and assure himself of its strength, the machinist must splice his own belt when it needs splicing. And, while it is often true that the repair of an apparatus and its use are confided to different sets of workmen, so separated from each other in their duties that they are not to be looked upon as fellow-servants,

it is equally true that the master may cast the duty of repair and of operation upon one set of servants, who thus become, as to all their duties, both of repair and operation, fellow servants with each other.

"Whether the employment of a particular class of servants embraces both the setting up of machinery for use and the using of it when so set up is a question of fact to be determined by the evidence. There manifestly is no legal principle standing in the way of an employer's committing to the same body of employees the business of setting up or even of constructing the machinery with which the business of the employer is to be carried on and of using such machinery in carrying on such business. It is a well known fact that in many manufacturing establishments as well as in divers other lines of employment the ordinary employee is expected and required to set up, adjust, repair or even manufacture the tools, implements, and machinery with which their work is done. In such case there can be no doubt that setting up and adjusting the machinery and using it are parts of the same employment and the person doing one is a fellow servant with him who does the other. The employer, may, at his pleasure, divide these species of service into two departments or combine them in one. Where they are divided and committed to distinct bodies of servants undoubtedly an injury to a servant of one class resulting from negligence of the servant of the other class entitles the servant injured to invoke the doctrine of *respondeat superior*. Whether

in any given case the two species of servants form two departments or one depends upon whether the same servants are employed by the master to perform both lines of service and so becomes a question of fact and not of law."

Holton *vs.* Daly, 4 Ill. App. 25.

"The evidence tends to show that the machinery was in charge of an employee who was the engineer and machinist of the manufactory. His duty required him to run the engine and keep the saw and attachments and other machinery in proper order and, in case any of the machinery was broken or became defective, to repair it. The evidence tended to further show that the injury resulted from a defective and worn out rope supporting a weight intended to keep the saw in place, which broke, permitting the saw to fly forward and strike the hand of plaintiff. It is the rule of this Court that an employee cannot, in an action against his employer, recover for the negligence of a co-employee engaged in prosecution of the common business. But this rule does not extend to an employee who is charged with no other duty than to inspect the machinery in the operation of which the injury occurs. But the engineer, it will be seen from the statement of the evidence just made, was not confined by his duty to the mere inspection of the machinery. He was in charge, was required to see that it was in good condition, and to repair it when broken or defective, and these duties were not separated from the operation of the machinery. The

engineer and plaintiff together operated it. The engine furnished the motive power propelling the saw, which did the work of sawing, the very purpose for which both engine and saw were used. The saw could not be operated without the engine. The engineer was engaged in operating the saw. He was therefore, a co-employee of plaintiff in the common business of both."

Thielman *vs.* Moeller, 73 Iowa, 108.

The evidence in the case at bar was to the effect that Ryan came to his death by the giving way of an improperly and carelessly spliced rope or tail, hung to the side of a coal tub to enable the dumpers to pull the tub towards them in the operation of unloading coal into the hold of a ship. The defendant, like the defendants in Cregan *vs.* Marston, 126 N. Y., 570, and Harley *vs.* B. C. M. Co., 142 N. Y., 37, provided and kept on hand in a convenient place the rope necessary for the making of these tails (Record, pp. 26, 33). It was the custom for the dumpers, including Ryan himself, to make and splice the tails and put them on the tubs for themselves; the defect in the splicing of the tail in question was obvious. To this state of facts the rule of the cases above cited is precisely applicable. Ryan must be held to have seen, felt, and known the condition of the splice; it was his duty to remedy it for himself at once; if the defect in the splice was due to the negligence of one of the other dumpers, such neglect was not that of the defendant, but of one of Ryan's fellow servants upon whom, with himself and

like himself, the custom of the business had cast the duty of keeping the tails constantly and instantly in good repair. In every view of the subject, the instructions complained of were fully within the law.

Respectfully submitted,

SIDNEY V. SMITH,

Attorney for Defendant in Error.